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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

ENTRY OF APPEARANCE OF COUNSEL
NOTARIZED STATEMENT OF FILING BY MAIL
CERTIFICATE OF SERVICE BY MAIL

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65 pp

QUESTIONS PRESENTED FOR REVIEW

Whether the Ninth Circuit Court of Appeals erred in affirming the trial court's judgment granting Respondents County of Kauai *et al.*'s motion for summary judgment.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

Petitioner Ronald Caldeira (hereinafter "EMPLOYEE"), pursuant to Respondents Hawaii Government Employees Association AFSCME Local 152, AFL-CIO's (hereinafter "UNION"), collective bargaining agreement, challenged Respondent County of Kauai's (hereinafter

"EMPLOYER") three-day suspension and termination of his employment at an arbitration hearing. The hearing took two days, during which six witnesses testified, a reporter transcribed the proceedings, and the parties entered several photographs and over one hundred pages as exhibits. Petitioner's Appendix (hereinafter "APP.") C. Both sides then submitted post-hearing briefs (District Court Clerk's Record [hereinafter "CR"] at 60). The arbitrator's Award upheld the suspension and termination.

Instead of immediately seeking relief in the state court from the Arbitrator's Award, EMPLOYEE filed this 42 U.S.C. § 1983 action in the Federal District Court, alleging not only that EMPLOYER had dismissed him improperly, but also that UNION and EMPLOYER had conspired for many years and during the arbitration to effect

his termination. UNION moved for dismissal or summary judgment (CR 60) in which EMPLOYER joined. CR 59. As exhibits for or against the motion, the parties provided the trial court with several hundred documents from EMPLOYEE'S employment file (CR 69), the applicable collective bargaining agreement (CR 73, Ex.B of Ex.A.), the entire transcripts of the arbitration hearing (CR 67, Ex.A), UNION'S arbitration post-hearing brief (CR 60, Ex.A), the Arbitrator's Award (CR 60, Ex.1), affidavits of the Arbitrator and EMPLOYEE'S attorney during the arbitration (CR 60) and the state court judgment which confirmed the Arbitrator's award. CR 76, Ex. A.

EMPLOYEE then moved the state court to reconsider its confirmation judgment or to vacate, correct or modify the Arbitrator's Award, and provided with his motions "the

same evidentiary record as in federal court." Petition for Certiorari (hereinafter "Pet.") at p. 12. While these motions were pending in the state court, the federal trial court granted EMPLOYER and UNION'S motion for summary judgment, based in part on the preclusive effect of the confirmation judgment. EMPLOYEE moved the federal court for reconsideration, and provided with his supporting memorandum the entire record from the state court proceedings. He included the transcripts from the reconsideration/ vacate, etc. hearing which showed that the state court had denied those motions. CR80. The federal trial court denied EMPLOYEE'S motion for reconsideration and he appealed to the Ninth Circuit Court of Appeals, which affirmed the trial court.

SUMMARY OF ARGUMENT

This Court should deny the Petition for Certiorari because 28 U.S.C. § 1738 and this Court's decisions and interpretations of that statute required both the trial court and appellate court to conclude that the state court judgment confirming the arbitrator's award prevented EMPLOYEE from relitigating in federal court whether EMPLOYER discharged him for proper cause.

Even if the state judgment did not preclude EMPLOYEE from litigating his federal claims, his failure to provide sufficient facts to support his allegations warranted the imposition of summary judgment against him.

ARGUMENT

I. 28 U.S.C. §1738 REQUIRED BOTH THE TRIAL AND APPEAL COURTS TO CONCLUDE THAT THE STATE COURT JUDGMENT, WHICH CONFIRMED THE ARBITRATOR'S AWARD, PREVENTED EMPLOYEE FROM RELITIGATING IN FEDERAL COURT WHETHER EMPLOYER DISCHARGED HIM FOR PROPER CAUSE.

The federal full faith and credit statute,

28 U.S.C. § 1738, implements the full faith and credit clause of the United States Constitution. For purposes of this action, the pertinent portion of the statute reads:

> Such ... judicial proceedings [of any court of any State] ... shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State ... from which they are taken.

In dealing with the applicability of § 1738 to an arbitrator's decision not judicially reviewed by a state court, this Court determined "that § 1738 obliges federal courts to give the same preclusive effect to a state-court judgment as would the courts of the State rendering the judgment." McDonald v. City of West Branch, 466 U.S. 284, 287, 104 S. Ct. 1799, 1802, 80 L. Ed. 302, 306 (1984). Accord, Migra v. Warren City School Bd. of Educ., 465 U.S. 75, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984) (§ 1738's preclusive effect of

state judgment to 42 U.S.C. § 1983 federal action to be determined under state law). This Court has ruled that even if a state court would give preclusive effect to one of its own state's judgments, federal preclusion would apply only where the party against whom the judgment is asserted had a "full and fair opportunity" to litigate his claim or issue in the state judicial proceedings. Allen v. McCurry, 449 U.S. 90, 95, 101 S. Ct. 411, 66 L. Ed. 2d 308, (1980). Also, the judgment must satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause. Kremer v. Chemical Construction Corp., 456 U.S. 461, 481, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982).

It is EMPLOYER's position that EMPLOYEE had a full and fair opportunity to litigate the propriety of his dismissal, as the arbitration proceeding, and the the state

court confirmation and reconsideration hearings provided him with due process of law. EMPLOYER further contends that Hawaii state law precludes him from relitigating the propriety of his discharge in state court, and thus § 1738 precludes him from relitigating the issue in federal court.

A. Hawaii Preclusion Law Would Not Allow Caldeira To Challenge Whether EMPLOYER Had Proper Cause To Discharge Him.

In determining the effect of the confirmation and reconsideration proceedings upon subsequent actions in Hawaii state courts, two questions must be asked:

1) Did the proceeding result in a valid judgment?

2) If so, what is the preclusive effect of the judgment under Hawaii state law?

Under Hawaii Revised Statutes Section

658-12, once the Hawaii trial court granted the order which confirmed the arbitrator's award, and EMPLOYER filed the order with the clerk of the court, the order became a judgment. Pursuant to H.R.S. Section 658-14 the judgment had "the same force and effect in all respects as ... a judgment in an action." These statutes read thusly:

> § 658-12 Entry of Judgment
>
> Upon the granting of an order confirming, modifying, or correcting an award, the same shall be filed in the office of the clerk of the circuit court and this shall constitute the entry of judgment. An appeal may be taken from such judgment as hereinafter set forth.
>
> § 658-14 Effect of Judgment
>
> The judgment entered in accordance with Section 658-12 has the same force and effect in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced, as if it had been rendered in an action in the court in which it is entered.

The latter statute clearly stated the Hawaii legislature's determination that the subject judgment, in and of itself, was legally valid. This validity remained attached to the judgment because it was never modified (Glover v. Fong, 42 Haw. 560, 574 (1958)) pursuant to the appeal provisions of H.R.S. Chapter 658, or other Hawaii statutes or rules of court.

Under Hawaii preclusion law, this judgment would bar EMPLOYEE from litigating any claim based upon an allegation of improper dismissal. In the state of Hawaii, it is well settled that:

> The judgment of a court of competent jurisdiction is a bar to a new action in any court between the same parties or their privies concerning the same subject matter, and precludes the relitigation, not only of the issues which were actually litigated in the first action, but also of all grounds of claim or defense which might have been properly litigated in the first action but were not litigated or decided.

Estate of Bernice P. Bishop, 36 Haw. 402,

416 (1943). See also, Silver v. Queen's Hospital, 63 Haw. 430, 629 P. 2d 1116 (1981); In re Estate of Ho Poi, 54 Haw. 35 (1972); Ellis v. Crockett, 51 Haw. 45, 451 P.2d 814 (1969); Glover v. Fong, 42 Haw. 560 (1958). Accord, Hall v. State, 7 Haw. App.___, 756 P. 2d 1048 (1988); Lundburg v. Stinson, 5 Haw. App. ____, 695 P. 2d. 328 (1985).

In Silver v. Queen's Hospital, 63 Haw. 430, 629 P. 2d. 1116 (1981), the Hawaii Supreme Court provided a three-part test to be used in order to apply res judicata or colatteral estoppel, an "aspect" of res judicata:

> [T]hree basic questions must ordinarily be answered in the affirmative: (1) Was the issue decided in the prior action identical with the issue presented in the present action? (2) Was there a final judgment on the merits in the prior action? (3) Was the party against whom the [preclusion] doctrine is asserted a party ... to the previous adjudication?

63 Haw. 436, 629 P. 2d 1121.

Upon application of these questions to the facts of the instant action, a Hawaii state court would not have allowed EMPLOYEE to pursue any action which depended on a finding that EMPLOYER improperly discharged him.

First, the arbitrator and the state court decided that EMPLOYEE'S discharge was proper. This was the identical issue at the heart of EMPLOYEE'S § 1983 cause of action in this case.

Further, it is apparent that the identical issue that the arbitrator and state court decided in EMPLOYER's favor was the issue upon which EMPLOYEE based his claim for relief in the instant action, i.e. EMPLOYER's supposed improper discharge of him. EMPLOYEE's prayer for relief in his complaint in the instant action clearly underscores this point. Therein he

requested not only the standard fees, costs, and just and proper further relief, but also "restoration of his job" and "general, special and punitive damages including but not limited to lost past, present, and future wages, back pay and front pay and compensation for injury to reputation for pain and suffering and mental distress ...." EMPLOYEE's basis for the relief he sought was, as the district court noted, the "linch-pin" of his § 1983 action, EMPLOYER's having improperly discharged him. In cases which contained far less indicia of identicality of issues than that of the instant action, the Hawaii Supreme Court repeatedly ruled preclusion to be applicable.

For example, Silver presented the converse of the situation in this action, in that a Hawaii trial court applied preclusion based on a federal trial court's judgment. The

plaintiff in Silver had instituted two state court suits against various hospitals and doctors for their denying him staff privileges at the hospitals. He based his actions on state antitrust statutes, and common law conspiracy. When he lost at trial on one of the suits, he appealed it to the Hawaii Supreme Court and, while the other state suit and his appeal were still pending, initiated a federal action naming the same defendants from his state law suits. In this federal suit he again alleged the defendants' conspiracy "and characterized his action as one 'involving a single ten-year state-wide conspiracy which continues to date and which violates the Sherman Act, the Clayton Act, and also the Civil Rights Act.'" 63 Haw. 434, 629 P. 2d 1119.

After the Hawaii Supreme Court decided the first suit in favor of the defendants

to that action, they successfully obtained summary judgment in the federal action on the basis of claim preclusion. The remaining federal defendants had by then obtained non-prejudicial dismissals of the original and first through third amended complaints in the federal suit. These defendants eventually succeeded in having the district court dismiss with prejudice the fourth amended complaint, and the plaintiff failed in his rehearing and certiorari petitions to the Ninth Circuit Court of Appeals and this Court, respectively.

Therefore, the defendants in the other state suit, the one that had been pending, moved for summary judgment based on the federal decision being a bar to the state suit. The trial court granted the motion and the Hawaii Supreme Court affirmed. In finding identicality of issues, the court

stated:

> At the heart of the plaintiff's complaint in all three cases was the alleged wrongful refusal of the defendant hospitals to grant him staff privileges. The basic charge in all of these cases was that the defendants had engaged in a long-term conspiracy to deprive him of these privileges and that in the process they had also violated the state antitrust statutes (in the state suits) and the federal antitrust and civil right acts (in the federal suit). The acts that were the subject of the state and federal claims were the same. The fact that the plaintiff sought relief under the civil rights act in his federal suit and alleged common law conspiracy and violation of Hawaii's antitrust laws in his state suits does not necessarily render his claims different causes of action for purposes of res judicata [sic]. [Citations] These cases essentially hold that alternate theories or claims arising from a single injury should be raised in a single action or they will be barred by res judicata. The single injury from which plaintiff suffered was, by his own allegation in the federal complaint, a single 10-year conspiracy involving, among others, all of the defendants in the instant suit. This was the same conspiracy to which the state suits were directed.

63 Haw. 437, 629 P. 2d 1122. See also, In re Estate of Ho Poi, 54 Haw. 35 (1972) (maternity determination for 17 children precluded some of children from litigating issue of "lawfully begotten children" in probate of father's will); Glover v. Fong, 42 Haw. 560 (1958) (prior determination in mandamus action that task which public officer had to perform was ministerial, precluded officer from litigating the issue in subsequent damages suit).

The Hawaii Appeals Court decided Lundburg v. Stinson, 5 Haw. App. 394, 695 P. 2d 328 (1985) in total conformity with the preclusive criteria of Silver. In Lundburg, various individuals, a trust and/or corporation (MLC) purportedly hired plaintiff to find a lessee-developer to develop property they owned and/or controlled. However, these defendants paid a comission to Stinson instead of plaintiff

when they entered into a lease with a corporation which plaintiff had initially contacted regarding the property. Plaintiff thus instituted an action against MLC (which by then had been dissolved) and Stinson for breach of contract, breach of promise and/or contractual interference. He then filed a second action against Stinson and the various individuals and a trust alleging, inter alia, that he was entitled to the comission "on the basis of quantum meruit or otherwise" and that Stinson had been unjustly enriched.

The trial court in the first action dismissed without objection his suit for failure to file a timely statement of readiness. The defendants in the second action were unsuccessful in moving for summary judgment based on the dismissal's preclusive effect, lost at trial, and appealed.

The Hawaii Court of Appeals applied the facts of the case to the requirements of Silver and reversed as to Stinson on the basis of res judicata. On the matter of identicality of issue, the court stated:

> Although the complaint against Stinson [in the first action] only raised contractual interference and breach of promise as grounds for relief, Lundburg is precluded from maintaining the present action against him for restitution or unjust enrichment since that claim could have been properly raised in [the first action]. Thus, questions (1) and (3) in Silver are answered in the affirmative.

5 Haw. App. 400, 695 P. 2d 333. See also, Hall v. State, 7 Haw. App. ___, 756 P. 2d 1048 (1988) (federal district court's dismissal of suit alleging law school's admission procedures and application thereof violative of over two dozen federal and state constitutional provisions and/or statutes, precluded litigation in state court of legality of the admission procedures or their application).

The courts' method of analyses in Silver and Lundburg, when applied to the instant action, clearly show that the judgment which confirmed the arbitrator's award decided an issue, i.e. whether EMPLOYER properly discharged EMPLOYEE, which was identical to that which supported and formed the basis for all of his federal claims. These claims alleged a conspiracy amongst EMPLOYER's past and present employees "so as to make out a case of good cause for [EMPLOYEE's] discharge," and UNION "knowingly joined in the conspiracy." Pet., at 3. The result of this conspiring, the loss of his job, purportedly denied EMPLOYEE liberty and property interests in violation of the Constitution of the United States of America. Id., p.4. It is thus evident that although EMPLOYEE now attempts to categorize his federal action as a challenge to the method used to secure his

discharge, he always was challenging the discharge itself. There is no legal distinction, for purposes of determining identicality of issues, (1) between the 10-year long conspiracy in Silver and the 5-year long conspiracies EMPLOYEE alleged herein and (2) between the results of the Silver and instant conspiracies, i.e. continued proper denial of hospital staff privileges in the former, and proper discharge in the latter. EMPLOYER is certain that if EMPLOYEE had brought his federal action in state court after the confirmation judgment was entered, such court, using the Silver criteria and method of analysis, would find that EMPLOYEE merely stated alternate theories or claims for relief which arose from the same acts and resultant injury as those of the arbitration and confirmation proceedings. Thus, the court would find identicality of

issues between the confirmation judgment and the federal claims.

Second, the confirmation judgment in this case was on the merits. In numerous Hawaii appellate court decisions upholding preclusion, parties have had less of an opportunity to litigate issues than EMPLOYEE had in state proceedings that now preclude his relitigation of his discharge. For example, in Lundburg, a dismissal for failure to file a statement of readiness was a judgment on the merits, and was given preclusive effect, even though the second action alleged different claims for relief. In Silver, a dismissal without leave to amend was treated likewise, irrespective that the first action alleged federal violations while the second action alleged state violations. Accord, Hall v. State.

Further, in both the Ho Poi and Glover cases, the Hawaii Supreme Court stated that even an erroneous final judgment was a judgment on the merits and would be given preclusive effect. See also, Matsushima v. Rego, 67 Haw. 556, 696 P. 2d 843 (1985) (a default judgment is a binding adjudication of all rights of the parties as contained in the complaint's facts and prayer for relief).

First, EMPLOYEE was a party in the arbitration and confirmation proceedings, and those facts thus meet the third requirement of Silver.

In this action, when EMPLOYER moved the state court to confirm the arbitrator's award, EMPLOYER provided the court with a copy of the award, while EMPLOYEE attached to his memorandum in opposition a copy of his federal complaint. CR 77, Ex.A of Ex.A. From the award, the court at the

very least was able to discern that EMPLOYEE had an opportunity to, and in fact did, challenge his discharge during the arbitration with ardency and imagination. EMPLOYEE had a two day hearing, calling six witnesses on his behalf, and entering several photographs as exhibits. EMPLOYEE also filed a post-hearing memorandum (CR 60, Ex.A) in which he argued that the discharge was not proper because he had not been insubordinate, his discipline amounted to disparate treatment, the orders he supposedly disobeyed were not lawful orders for his job position, and he had not received progressive discipline. However, the award also showed the court that EMPLOYEE was an incompetent worker for years; EMPLOYER repeatedly attempted to improve his performance; UNION represented EMPLOYEE every single time he <u>imagined</u> impropriety on the part of EMPLOYER; solely

due to UNION's efforts and requests, EMPLOYER often undertook actions merely to placate EMPLOYEE, although EMPLOYER had not believed that it was legally or contractually obligated to act; EMPLOYEE's continued substandard performance, not anything he still imagines anyone did, finally caught up with him; and not even his attorney from UNION or the arbitrator could undo the validity of EMPLOYER's final act--the dismissal--which he brought himself.

From the federal complaint the state court saw that every instance of wrongdoing on the part of EMPLOYER or UNION alleged therein, from "EPISODE 1" through the arbitration hearing, had been addressed in, by or through the arbitration hearing and process; and that each and every one of EMPLOYEE's federal claims sought to undo the arbitrator's well-founded decision that

EMPLOYER had proper cause to discharge EMPLOYEE.

Therefore, with both the award and the federal complaint before it, the state court entered a judgment that confirmed the award. The judgment therefore made final all of the arbitrator's findings of EMPLOYEE's incompetence, insubordination, irrational dislike of his co-employees and representatives from UNION, and self-inflicted discharge, and EMPLOYER's and UNION's legally-proper conduct from the time EMPLOYEE first worked for EMPLOYER through EMPLOYEE's discharge. Thus, the judgment was on the merits.

For elementary recapitulation of its preceding analyses and arguments, EMPLOYER states that under Hawaii law, the confirmation judgment would have precluded EMPLOYEE from litigating in a state court any action or claims, such as that which he

filed in this case, that depended on a determination that EMPLOYER improperly discharged him.

B. During The Arbitration Process, The Hearing To Confirm The Arbitrator's Award, And The Hearing To Reconsider The Confirmation Judgment, EMPLOYEE Had A Full And Fair Opportunity To, And Actually Did, Litigate The Propriety Of His Discharge.

As EMPLOYER discussed previously, this court has ruled that irrespective of whether a state court would give preclusive effect to one of its own state judgments, federal preclusion would apply in a subsequent § 1983 action to such a judgment only where the party against whom the judgment is asserted had a "full and fair opportunity" to litigate his claim or issue in the proceedings. Allen v. McCurry, 449 U.S. 90, 95, 101 S.Ct. 411, 66 L. Ed. 2d 308 (1980). Subsequent to the Allen decision, the Court has decided cases which, through the upholding of preclusion, clarified what proceedings afforded a full

and fair opportunity to litigate. These cases dealt with Title VII and § 1983 actions, and state court judgments where the claim or issue was actually or could have been litigated in the state judicial proceedings, and where a state court reviewed an administrative decision. It appears that the basic motivation behind the Court's decisions therein is a recognition that preclusion "relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication. [Citation]." Id., at 94; University of Tennessee v. Elliot, 478 U.S. 788, 798, 106 S.Ct. 3220, 92 L. Ed. 2d 635 (1986).

EMPLOYER believes that the arbitration and state court proceedings in which EMPLOYEE ardently participated, provided him with a

full and fair opportunity to litigate his termination, in conformity with the Court's decisions. Further, the application of the confirmation judgment to preclude his instant action not only would comport with these decisions, but also would serve to prevent multiplicity of lawsuits, conserve judicial resources, and encourage reliance on adjudication.

In Allen, undercover police officers attempted to purchase heroin at a house which McCurry occupied, a gun battle ensued, and McCurry seriously wounded two of the officers. McCurry eventually surrendered, and officers entered the house without a warrant to search for other occupants. While inside, one of the officers seized drugs and other contraband that were in plain view as well as other contraband hidden in dresser drawers and tires on the porch.

McCurry was charged with assault with intent to kill and possession of heroin. He moved to suppress the evidence seized from the house, and the trial judge excluded the evidence seized in the tires and dresser drawers. McCurry was convicted of both offenses, and was unsuccessful in his appeal to the state's appellate court.

McCurry then filed a § 1983 claim for damages in federal district court against various defendants for conspiracy to violate and violation of, his Fourth Amendment rights. The District Court granted the defendants' motion for summary judgment, holding that collateral estoppel barred the plaintiff from relitigating the search and seizure issue already decided against him in the state court criminal action.

The Court of Appeals reversed ruling that since McCurry was barred from federal

habeas corpus relief, and a § 1983 cause of action was his only means of litigating his constitutional claim in a federal forum, collateral estoppel did not apply to bar his § 1983 claim.

In reversing the Court of Appeals, this Court stated that:

> [N]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 USC § 1738 [Footnote]. Section 1983 creates a new federal cause of action. It says nothing about the preclusive effect of state-court judgments.
>
> Moreover, the legislative history of § 1983 does not in any clear way suggest or restrict the traditional doctrines of preclusion.

449 U.S. at 97-98.

This Court went on to hold that collateral estoppel applied to the plaintiff's conspiracy and Fourth Amendment claims in his § 1983 suit, and he therefore could not relitigate the propriety of the search in

federal court. However, left unsaid by the Court, but inherent in its decision was a determination that a suppression hearing, a trial and an appeal afforded McCurry a full and fair opportunity to litigate his claims.

Kremer v. Chemical Construction Corp., 456 U.S. 461, 72 L. Ed. 2d 262, 102 S.Ct. 1883 (1982) involved the preclusive effect a state court review of an administrative decision would have on a subsequent Title VII federal action.

In Kremer, the respondent laid off then did not rehire the petitioner (Kremer). After an unsuccessful state administrative hearing and state court review thereon, Kremer brought a Title VII action in the federal district court on the basis of racially discriminatory discharge. The Federal District Court for the Southern District of New York dismissed the

complaint on the basis of res judicata and the United States Court of Appeals for the Second Circuit affirmed.

On certiorari, Kremer argued before this Court that administrative and judicial procedures, while adequate to preclude relitigation in state court, were inadequate to preclude relitigation of his Title VII claim in federal court. In affirming the Second Circuit, this Court noted that "[n]o single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause. [Citations]" Id., at 483.

The Court analyzed the state procedures and found that when Kremer filed his discrimination complaint with the state agency, the agency first investigated if there was probable cause to believe that the complaint was true. During the investigative process, he was given an

opportunity to present evidence, including exhibits and the testimony of witnesses, and the opportunity to rebut evidence presented by his former employer. He also had the right to counsel and the right to subpoena witnesses. Had the agency determined that probable cause existed, or if the investigation had not in fact allowed Kremer to present fully his contentions and evidence, then an appeal board would have been required to hold a public hearing on the merits of the complaint. Finally, Kremer had the right and did obtain judicial review of the agency's determination of no probable cause. This Court concluded that these procedures satisfied the Due Process Clause. Id., at 483-84.

This Court has also held that state law determines the preclusive effect of a state court judgment upon a subsequent § 1983

suit in federal district court even though the § 1983 claim was not litigated in the state court proceeding. Migra v. Warren City School Board of Education, 463 U.S. 75, 79 L. Ed. 2d 56, 104 S.Ct. 892 (1984).

Dr. Ethel Migra was the supervisor of elementary education in the Warren (Ohio) City School District whose employment contract the school board renewed. However, after she accepted, the school board re-voted and rescinded the renewal. She sued the board and its members in a state court for breach of contract and wrongful interference with her contract. She prevailed on the breach of contract cause of action, received a judgment for reinstatement and compensatory damages, and the Ohio appellate court affirmed.

Subsequently, she filed a complaint in federal district court pursuant to 42 U.S.C. §§ 1983 and 1985, claiming violation

of her rights under the First, Fifth and Fourteenth Amendments. The defendants moved for summary judgment, arguing that the complaint was barred by res judicata and the statute of limitations. The district court granted the defendants' motion for summary judgment and dismissed the complaint, and the United States Court of Appeals for the Sixth Circuit affirmed.

Upon granting certiorari, this Court discussed its prior decisions in Allen and Kremer and noted that the former "left open the possibility ... that the preclusive effect of a state-court judgment might be different as to a federal issue that a § 1983 litigant could have raised but did not raise in the earlier state-court proceeding." Id., at 83.

The petitioner argued for "this Court to interpret the interplay of § 1738 and § 1983 in such a way as to accord state-

court judgments preclusive effect in § 1983 suits only as to issues actually litigated in state court." Id. The petitioner argued that by denying state-court judgments claim preclusive effect, plaintiffs could still bring their federal claims to federal court and take advantage of the expertise of the federal forum. This Court noted that while "attractive from a plaintiff's perspective, it is not the system established by § 1983. That statute embodies the view that it is more important to give full faith and credit to state-court judgments than to ensure separate forums for federal and state claims." Id., at 84. The Court then rejected the argument and held "that petitioner's state-court judgment in this litigation has the same claim preclusive effect in federal court that the judgment would have in the Ohio state courts." Id.,

at 85.

While Migra dealt with claim preclusion, this Court, in deciding Migra, stated that "[i]t is difficult to see how the policy concerns underlying § 1983 would justify a distinction between the issue preclusive and claim preclusive effects of state-court judgments." Id., at 83. Therefore the rationale underlying the holding of Migra should apply to cases involving issue preclusion, such as the instant action.

EMPLOYEE had every opportunity to and did in fact litigate in the arbitration process, and state court confirmation and reconsideration proceedings, the "linch pin" of his § 1983 action, i.e., whether EMPLOYER had proper cause to discharge him. A review of those processes available to him and/or he actually used, show clearly that they afforded him all process due under the Fourteenth Amendment and this

Court's above-discussed decisions.

The arbitration process gave him the right to a hearing, to counsel, to obtain subpoenae, to present witnesses and documentary exhibits, to cross examine witnesses, to submit a post-hearing brief; to move a state court, or oppose a motion, to confirm, modify, correct or vacate the arbitrator's award; and to appeal to Hawaii's appellate courts any state court order vacating, or judgment entered upon, the award. During the actual arbitration proceedings EMPLOYEE did in fact have a two-day hearing, have counsel represent him, present witnesses and documentary exhibits, cross-examine EMPLOYER's witnesses, and submit a post-hearing brief.

When EMPLOYER moved the state court to confirm the award, EMPLOYEE filed a memorandum in opposition. The state court entered a judgment on the award based on

the arguments of counsel and the records of the action, which included inter alia, the arbitrator's findings that supported his decision that EMPLOYER discharged EMPLOYEE for proper cause. EMPLOYEE then moved the court for reconsideration, or to modify, correct or vacate the award, submitting therewith "the same evidentiary record as in federal court." The state court reviewed the transcripts of the arbitration hearing and all of EMPLOYEE's submittals, and found that the hearing had been "hotly contested" and the arbitrator had had "tremendous patience." App. G. at 21. The court therefore denied EMPLOYEE's motions.

EMPLOYEE mistakenly believed he could not take an appeal of the confirmation judgment, and instead filed a petition for mandamus in the Hawaii Supreme Court, which was denied. He then appealed the confirmation judgment, which the Hawaii

Supreme Court also denied, on the basis of untimeliness. While EMPLOYEE argues that this inability to take an appeal is another factor which shows he did not have a full and fair opportunity to litigate his claims during the state judicial proceedings (Pet. at 31-32), even a cursory reading of the arbitration provision and statute which supposedly prevented appeal, reveals the error in that argument.

The provision and statute read:

> Article 11, H. Step 4. Arbitration.
>
> * * * *
>
> The decision of the Arbitrator shall be final and binding upon the Union, its members, the Employees involved in the grievance, and the Employer. There shall be no appeal from the Arbitrator's decision by either party, if such decision is within the scope of the Arbitrator's authority as described below:
>
> 1. The Arbitrator shall not have the power to add to, subtract from, disregard, alter, or modify any of the terms of this Agreement.
>
> 2. His power shall be limited to deciding whether the Employer has violated any of the terms of this Agreement.

> 3. In any case of suspension or discharge where the Arbitrator finds such suspension or discharge was improper, the Arbitrator may set aside, reduce or modify the action taken by the employer. If the penalty is set aside, reduced or otherwise changed, the Arbitrator may award back pay to compensate the Employee, wholly or partially, for any wages lost because of the penalty. (Emphasis added)

> Hawaii Revised Statutes, § 658-15. Appeal when. Unless the agreement for award provides that no appeal may be taken an appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action, otherwise no appeal may be had. (Emphasis added)

As is evident, the contractual provision did in fact provide some grounds for appealing (to a state circuit court) the arbitrator's decision. On the other hand, the statute would enforce any agreement which restricted appeals of a court's "order vacating an award or ... a judgment entered upon an award." Through the contractual provision, it is clear that

EMPLOYER and UNION agreed not to appeal an arbitrator's decision to the circuit court unless certain grounds stated in the provision were present. However, the provision cannot be read in any manner which even intimates that there could be no appeal of the court's confirmation judgment. See Salud v. Financial Security Ins. Co. Ltd., 69 Haw. ____, 745 P. 2d 290 (1987) (order denying motion to vacate not appealable because not a judgment upon an order; upon denial, unsuccessful movant should confirm adverse award then take appeal of the judgment confirming award).

II. EVEN IF THE STATE JUDGMENT DID NOT PRECLUDE EMPLOYEE FROM MAINTAINING HIS 42 U.S.C. § 1983 ACTION, EMPLOYEE NEVERTHELESS FAILED TO PROVIDE FACTS OF SUFFICIENT SPECIFICITY TO WITHSTAND SUMMARY JUDGMENT.

Were this Court to hold that the state confirmation judgment prevented EMPLOYEE from relitigating that his discharge was

proper, and hence self-inflicted, then he would not be able to maintain this entire federal action, to include both his § 1983 and 1985(3) claims. See, Casseratti v. Nevada County, 824 F. 2d 735 (9th Cir. 1987) (without § 1983 deprivation of rights, § 1985 conspiracy claim based on same facts not actionable); Villanueva v. McInnis, 723 F. 2d 414 (5th Cir. 1984) (conspiracy to commit murder not actionable where no constitutional deprivation). However, even if the Court were to rule that the judgment had no preclusive effect, the application of the facts of this action to this Court's summary judgment decisions, show that the granting of summary judgment was proper.

> [A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. As Adickes [v. S.H.Kress & Co., 398 U.S. 144 (1970)], supra, and [First National Bank of Arizona v.] Cities

Service [Co., 391 U.S. 253 (1968)] supra indicate, there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. Cities Service, 391 U.S. at 288-389. If the evidence is colorable, Dombrowski v. Eastland, 387 U.S. 82 (1967) (per curiam), or is not significantly probative, Cities Service, supra, at 290, summary judgment may be granted.

* * * *

[W]e are convinced that the inquiry involved in ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits. If the defendant in a run-of-the-mill civil case moves for summary judgment or for a directed verdict based on the lack of proof of a material fact, the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L. Ed. 2d 202

(1986).

In Liberty Lobby, the Court had to decide the parameters for the granting of summary judgment in a libel action, given the clear and convincing burden of proof it had established in New York times Co. v. Sullivan, 376 U.S. 255 (1964). The Court of Appeals, D.C. Circuit, in not granting summary judgment on 9 of 30 allegedly defamatory statements, had ruled that "[t]o defeat summary judgment the respondents did not have to show that a jury could find actual malice with 'convincing clarity.'" 477 U.S. at 247. As the first-provided quote shows, the Supreme Court ruled otherwise, recognizing that a judge could grant summary judgment if the facts were such that a fair-minded jury would not find for the plaintiff.

Particularly relevant to the instant case was the Court's disposition of the

respondents' argument, based on Poller v. Columbia Broadcasting Co., 368 U.S. 464 (1962), that summary judgment should seldom, if ever, be granted where the state of mind (in Liberty Lobby, malice) was at issue. The Court disagreed, based on its finding that Poller had not held that a plaintiff did not have to offer any concrete evidence from which a reasonable juror could return a verdict in his favor in order to defeat a properly supported summary judgment motion. Further, the Court decided that Rule 56 (e), Cities Services and Bose Corp. v. Consumers Union, 466 U.S. 485 (1984), mandated the direct opposite, "that the plaintiff could not defeat the properly supported summary judgment motion of a defendant charged with a conspiracy without offering 'any significant probative evidence tending to support the complaint'". 477 U.S. at

253. See also, Eisenberg v. Ins. Co. of North America, 815 F. 2d 1285, 1289 (9th Cir. 1987); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn., 809 F. 2d 626 (9th Cir. 1987).

Other decisions of this Court are important in order to show the applicability of the Liberty Lobby holdings to the instant action. First, in Mount Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977), this Court held that in order for the plaintiff, who the defendant Board failed to rehire, to have been able to maintain his § 1983 action based on a First Amendment free speech violation, he had to have shown that his exercise of his constitutionally-protected right was a "substantial factor" in causing his injury. Further, on remand, this Court directed the trial court "to determine whether the Board

[could show] by a preponderance of the evidence that it would have reached the same decision as to [plaintiff's] re-employment even in the absence of the protected conduct." Accord, Elwood v. Pina, 815 F. 2d 173 (1st Cir. 1987) (jury instructions proper which required the defendant to prove by preponderance of the evidence that there was valid reason for discharge, or the jury to expressly find that plaintiffs would not have been fired but for their exercise of political activity).

Finally, the Court has held that the intent and language of § 1985(3) restrict the statute's application to conspiracies which "aim at a deprivation of the equal enjoyment of rights secured by law." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L. Ed. 2d 338 (1971). United Brotherhood of Carpenters and

Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 835, 103 S.Ct. 3352, 77 L. Ed. 2d 1049 (1983). Further, the conspiracy must be motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Id., 463 U.S. at 829.

All of the preceding, combined with the entire record of the instant case, show that the granting of summary judgment in favor of UNION and EMPLOYER was and is proper. At the trial court level, EMPLOYER and UNION provided a wholly adequate showing that EMPLOYEE caused his own discharge through his insubordination and substandard performance (CR 60, Ex. 1; CR 76, Ex. A), and that they had never conspired to effect his dismissal. CR 60, Ex. A, and Affidavits of Khim and Ling; CR 67, Ex. A. Further, at least from

EMPLOYER's perspective, EMPLOYEE's several hundred page submission of documentary evidence (CR 69) gave the trial court and now gives this Court even more of a reason to grant summary judgment on the basis that no fair-minded jury could return a verdict that EMPLOYER did not have proper cause to discharge EMPLOYEE.

The submission shows that EMPLOYEE was incompetent in performing his employment obligations; he created, only in his mind, instances of gross misconduct by EMPLOYER and UNION; and nothing except complete acquiescence to all of his demands would have shown him that EMPLOYER and UNION were not trying to "get him." CR 69, passim. While EMPLOYEE might have hoped and does hope that some place in the record there may be some sort of indications of wrongdoing by EMPLOYER and UNION which caused his discharge, his hope had and has

no factual basis. No one, and especially a reasonable juror, could review the record and arrive at the same perception as EMPLOYEE, much less return a verdict in his favor. The legal, proximate cause of his discharge was his insubordinate behavior and poor work performance. Even if EMPLOYER and UNION had conspired to effect his discharge, his own actions and inactions provided more than adequate justification for EMPLOYER to discharge him.

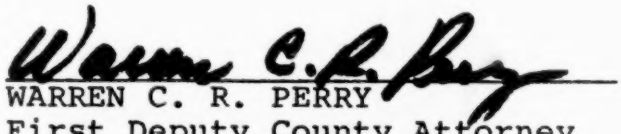
Further, nowhere in his pleadings, his submissions or other portions of the trial Court's record appears any intimation that the supposed conspiracy which led to his discharge was based on "some racial, or perhaps class-based, invidiously discriminatory animus." Thus, based on Liberty Lobby and Griffin, summary judgment in favor of EMPLOYER and UNION was and is

proper relative to his § 1985 claims.

CONCLUSION

Based upon the foregoing arguments, Respondents County of Kauai, et al. respectfully request that this Court deny the Petition for Certiorari, and award to Respondents its costs and fees incurred in defending against this action.

DATED: Lihue, Hawaii, July 5, 1989.



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NOTARIZED STATEMENT OF FILING BY MAIL

AND

CERTIFICATE OF SERVICE BY MAIL

STATE OF HAWAII)
) SS.
COUNTY OF KAUAI)

I, Warren C. R. Perry, being first duly sworn, depose on oath and state that I am a member of the Bar of the Supreme Court of the United States; and that on the 5th day of July, 1989, a date within the time permitted, I mailed the original document attached hereto to the Clerk of the United States Supreme Court for filing, first class postage prepaid, and I served copies of the Notice of Appearance of Counsel on the following persons at the following addresses by causing copies to be mailed in duly addressed envelopes, with first class postage prepaid as follows:

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Subscribed and sworn to before me this
5th day of July, 1989.

Vs. Quien L. Tanga

NOTARY PUBLIC, STATE OF HAWAII
My Commission Expires: 6-21-92

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

RONALD CALDEIRA, Petitioner

v.

COUNTY OF KAUAI;
HAWAII GOVERNMENT EMPLOYEES ASSOCIATION,
AFSCME LOCAL 152, AFL-CIO,
et al., Respondents

ON CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ENTRY OF APPEARANCE OF COUNSEL

Comes now Warren C. R. Perry and on behalf of Respondents County of Kauai, et al., herewith enters his appearance, for the purpose of responding to a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, for review of the Ninth Circuit's decision and opinion in Caldeira v. County of Kauai, et al., 866

F.2d 1175 (9th Cir. 1989, Docket No. 87-2959).

DATED: Lihue, Hawaii, July 5, 1989.

Respectfully submitted,

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